

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

1 Sep 24, 2020
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SEAN F. McAVOY, CLERK

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PAMELA LYNCH,

Plaintiff,

v.

ETHICON INC., ETHICON LLC, and
JOHNSON & JOHNSON,

Defendants.

No. 2:20-cv-00217-SMJ

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

Before the Court, without oral argument, is Defendants' Motion for Summary Judgment, ECF No. 37. Having reviewed the briefing and the record in this matter, the Court is fully informed and grants the motion.

BACKGROUND

Pamela Lynch alleges that she suffered severe complications from the implantation of Defendants' pelvic mesh product, the Gynecare Prolene Lot # CGB768, or Gynemesh PS ("Mesh Product"), during a surgery to treat her stress urinary incontinence and symptomatic rectocele. ECF No. 1 at 2; ECF No. 37-4 at 3. After implantation, she allegedly experienced urinary problems; dyspareunia; abdominal, pelvic, lower back, vaginal, and rectal pain; urinary tract and bladder

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY
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1 infections; urinary and fecal incontinence, and related emotional distress and
2 diminished quality of life. ECF No. 37-4 at 4–5. She sued in the Southern District of
3 West Virginia multi-district litigation (“the MDL”). ECF No. 1.

4 On May 21, 2019, Scott Bailey, M.D., drafted an expert report, opining
5 Defendants' Mesh Product caused Lynch's injuries. *See* ECF No. 41-7. Lynch has
6 presented other evidence, such as the expert opinion of Dionysios Veronikis, M.D.
7 that generally addresses the alleged design defect. *See* ECF No. 41-9. Dr. Veronikis
8 holds board certifications in female pelvic medicine and reconstructive surgery. *Id.*
9 41-9 at 2. His report discusses the defects of the Mesh Product, including its design,
10 material and properties, and method of surgical placement, and their correlation to
11 symptoms in patients. *See, e.g., id.* at 4. Dr. Veronikis discusses an internal Ethicon
12 email in which Ethicon states that “[p]olypropylene creates an intense
13 inflammatory response that results in rapid and dense incorporation into the
14 surrounding tissue.” *Id.* at 7.

15 On May 29, 2020 Judge Goodwin in the Southern District of West Virginia
16 transferred Lynch's case to the Eastern District of Washington under 28 U.S.C. §
17 1404(a). ECF No. 53.

LEGAL STANDARD

19 The Court must grant summary judgment if “the movant shows that there is
20 no genuine dispute as to any material fact and the movant is entitled to judgment as

1 a matter of law.” Fed. R. Civ. P. 56(a). A fact is “material” if it “might affect the
2 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477
3 U.S. 242, 248 (1986). A dispute about a material fact is “genuine” if “the evidence
4 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

5 On a summary judgment, the Court must view the evidence in the light most
6 favorable to the nonmoving party. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014)
7 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). Thus, the Court
8 must accept the nonmoving party’s evidence as true and draw all reasonable
9 inferences in its favor. *See Anderson*, 477 U.S. at 255. The Court may not assess
10 credibility or weigh evidence. *See id.* Nevertheless, the nonmoving party may not
11 rest upon the mere allegations or denials of its pleading but must instead set forth
12 specific facts, and point to substantial probative evidence, tending to support its
13 case and showing a genuine issue requires resolution by the finder of fact. *See*
14 *Anderson*, 477 U.S. at 248–49.

15 DISCUSSION

16 A. The Court grants summary judgment as to Counts I–IV and VI–XV

17 Defendants moved for summary judgment on August 13, 2019. ECF No. 37.
18 In the intervening thirteen months, Lynch has had ample opportunity to seek leave
19 from this Court or the MDL court to voluntarily dismiss those claims. Lynch has
20 failed to do so. Lynch has also failed to raise any argument as to why these claims

1 should not be dismissed. This Court thus finds it appropriate to grant summary
2 judgment as to Counts I through IV and VI through XV.

3 **B. The Court grants summary judgment as to Count V**

4 The parties agree that Washington State substantive law applies in this case.
5 ECF No. 38 at 7–8; ECF No. 42 at 5; *see also Martin v. Humbert Constr., Inc.*, 61
6 P.3d 1196, 1199 (Wash. App. 2003). Under Washington State law, the Washington
7 Products Liability Act (WPLA) preempts common law causes of action. *See Wash.*
8 *Water Power Co. v. Graybar Elec. Co.*, 774 P.2d 1199, 1203 (Wash. 1989). This
9 Court construes Count V, strict liability for design defect, as stating a claim under
10 WPLA. *See* ECF No. 42 at 5. To prevail in a WPLA claim for design defect, a
11 plaintiff must show that (1) a manufacturer’s product (2) not reasonably safe as
12 designed (3) caused harm to the Plaintiff. *See Pagnotta v. Beall Trailers of Oregon,*
13 *Inc.*, 991 P.2d 728, 732 (Wash. App. 2000); Wash. Rev. Code § 7.72.030(1).

14 **1. Lynch has not established a genuine issue of material fact as to
proximate cause**

15
16 To establish a prima facie case of strict liability for design defect under the
17 WPLA, a claimant must establish that the defect was the proximate cause of the
18 injury. Wash. Rev. Code § 7.72.030(1). “Expert testimony is required to establish
19 causation when,” as here, “an injury involves obscure medical factors that would
20 require an ordinary lay person to speculate or conjecture in making a finding.”

1 *Bruns v. PACCAR, Inc.*, 890 P.2d 469, 477 (Wash. App. 1995).

2 Lynch argues that several experts submitted reports that work in concert to
 3 establish proximate cause. ECF No. 42 at 6–7. Dr. Veronikis opined generally on
 4 the design defects he observed in the Mesh Products, as described above. ECF No.
 5 41-9. And Lynch’s case specific expert, Scott Bailey, M.D., opined that the Mesh
 6 Product caused Plaintiff’s injuries. Using a differential diagnosis, Dr. Bailey ruled
 7 out other potential causes of Lynch’s injuries. ECF No. 41-7. Yet Defendants argue
 8 this is not enough. Because Dr. Bailey did not attribute Lynch’s injuries to the
 9 asserted *defects* in the Mesh Product, Defendants argue, Lynch has failed to
 10 establish a genuine issue of material fact as to proximate cause. Defendants also
 11 rightly assert that because Dr. Veronikis’s expert report is unsworn, it is
 12 inadmissible for the purposes of summary judgment. *See* ECF No. 41-9; *see also*
 13 *Harris v. Extendicare Homes, Inc.*, 829 F.Supp.2d 1023, 1027 (W.D. Wash. 2011);
 14 *Shuffle Master, Inc. v. MP Games LLC*, 553 F. Supp.2d 1202, 1210–11 (D. Nev.
 15 2008). Because the Court’s disposition here turns on the deficiencies in Dr. Bailey’s
 16 assertion of causation, Plaintiff fails to show that there is a genuine issue of material
 17 fact even if Dr. Veronikis’s report were admissible.

18 “[T]he manufacturer is liable for harm proximately caused *by the design*
 19 *defect.*” *Ruiz-Guzman v. Amvac Chem. Corp.*, 7 P.3d 795, 800 (Wash. 2000)
 20 (emphasis in original) (quoting *Falk v. Keene Corp.*, 782 P.2d 974, 978 (Wash.

1 1989)). A plaintiff “must do more than ‘merely suggest the possibility that
2 proximate cause exists.’” *Paeschke v. General Motors LLC*, No. 4:16-cv-5050-
3 LRS, 2017 WL 5632442 at *4 (E.D. Wash. Oct. 11, 2017) (quoting *Browne v.*
4 *McDonnell Douglas Corp.*, 698 F.2d 370, 371 (9th Cir. 1982)). Lynch’s experts have
5 not opined that a *design defect* in Defendants’ Mesh Products caused *her* injuries.
6 Dr. Veronikis has opined that the design defects in the Mesh Products *can* cause an
7 “intense inflammatory response.” And Dr. Bailey opined that an inflammatory
8 response was responsible for Lynch’s pain. But without an expert opinion asserting
9 a causal link between the general *design defects* identified by Dr. Veronikis and
10 Lynch’s injuries, Lynch has not established a genuine issue of material fact.

11 Courts in other circuits have also adopted this reasoning in similar cases
12 involving plaintiffs allegedly harmed by comparable mesh products. In *Abt v.*
13 *Ethicon, Inc.*, No. 1:20-cv-0047 SRC, 2020 WL 4887022 at *3–*4 (E.D. Mo. Aug.
14 20, 2020), the court found that where the case specific expert did not connect
15 plaintiff’s injuries to a design defect in the TVT-O mesh product, or build off the
16 general expert’s report about the design defects, plaintiff had not established a
17 genuine issue of material fact. And in *Lewis v. Johnson & Johnson*, 601 Fed. App’x
18 205, 211–212 (4th Cir. 2015), the Fourth Circuit upheld a directed verdict for
19 defendants where plaintiff’s experts did not establish “a causal link between these
20 alleged defects . . . and [plaintiff’s] injuries.” In *Howard v. Ethicon, Inc.*, __

1 F.Supp.3d __, No. CV-20-01137-PHX-MTL, 2020 WL 3971719 at *2–3 (D. Ariz.
2 July 14, 2020), the court declined defendants’ *Daubert* motion to exclude the
3 opinions of Dr. Bailey in another case on similar facts. Despite defendants’
4 arguments, mirrored here, that Dr. Bailey did not opine on whether a *design defect*
5 in the mesh product caused plaintiff’s injuries, the court concluded that Dr. Bailey’s
6 testimony was relevant. *Id.* Yet that conclusion is consistent with the instant Order.
7 Determining relevance for the purposes of a *Daubert* motion is a different inquiry
8 from determining if there is a genuine issue of material fact for a summary judgment
9 motion. Because Plaintiff has failed to establish that there is a genuine issue of
10 material fact regarding causation, the Court must grant the Defendants’ Motion for
11 Summary Judgment.

12 Accordingly, **IT IS HEREBY ORDERED:**

13 1. Defendants’ Motion for Summary Judgment, ECF No. 37, is
14 **GRANTED.**

15 2. Counts I–XV of Lynch’s Complaint, ECF No. 1, are **DISMISSED**
16 **WITH PREJUDICE.**

17 3. The Clerk’s Office is **DIRECTED** to enter judgment in favor of
18 Defendants Johnson & Johnson, Ethicon, Inc., and Ethicon LLC, and
19 **CLOSE** this file.

20 //

4. Defendants' Motion to Exclude the Case-Specific Opinions of Scott Bailey, M.D., ECF No. 39, is **DENIED AS MOOT**.

IT IS SO ORDERED. The Clerk's Office is directed to enter this Order and provide copies to all counsel.

DATED this 24th day of September 2020.

Salvador Mendoza Jr.
SALVADOR MENDOZA, JR.
United States District Judge